PART 6 FINAL INSTRUCTIONS: DELIBERATIONS AND VERDICT

6.01 Foreperson's Role; Unanimity

[Updated: 6/14/02]

I come now to the last part of the instructions, the rules for your deliberations.

When you retire you will discuss the case with the other jurors to reach agreement if you can do so. You shall permit your foreperson to preside over your deliberations, and your foreperson will speak for you here in court. Your verdict must be unanimous.

6.02 Consideration of Evidence

[Updated: 6/14/02]

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions. However, nothing that I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

6.03 Reaching Agreement

[Updated: 6/14/02]

Each of you must decide the case for yourself, but you should do so only after considering all the evidence, discussing it fully with the other jurors, and listening to the views of the other jurors.

Do not be afraid to change your opinion if you think you are wrong. But do not come to a decision simply because other jurors think it is right.

This case has taken time and effort to prepare and try. There is no reason to think it could be better tried or that another jury is better qualified to decide it. It is important therefore that you reach a verdict if you can do so conscientiously. If it looks at some point as if you may have difficulty in reaching a unanimous verdict, and if the greater number of you are agreed on a verdict, the jurors in both the majority and the minority should reexamine their positions to see whether they have given careful consideration and sufficient weight to the evidence that has favorably impressed the jurors who disagree with them. You should not hesitate to reconsider your views from time to time and to change them if you are persuaded that this is appropriate.

It is important that you attempt to return a verdict, but, of course, only if each of you can do so after having made your own conscientious determination. Do not surrender an honest conviction as to the weight and effect of the evidence simply to reach a verdict.

Comment

This is *not* an Allen charge for a deadlocked jury. See Instruction 6.06. Some authority outside the First Circuit, however, holds that an instruction like this in the general charge makes a later supplemental charge to a deadlocked jury more sustainable. United States v. Brown, 634 F.2d 1069, 1070 (7th Cir. 1980) (requiring this type of charge as a precondition for a later supplemental charge); Comment to Eighth Circuit Instruction 10.02 ("preferable"); accord United States v. Rodriguez-Mejia, 20 F.3d 1090, 1091-92 (10th Cir. 1994); United States v. Williams, 624 F.2d 75, 76-77 (9th Cir. 1980); see also Comment to Sixth Circuit Instruction 8.04.

6.04 Return of Verdict Form

[Updated: 6/14/02]

I want to read to you now what is called the verdict form. This is simply the written notice of the decision you will reach in this case.

[Read form.]

After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign and date it, and advise the jury officer outside your door that you are ready to return to the courtroom.

After you return to the courtroom, your foreperson will deliver the completed verdict form as directed in open court.

6.05 Communication with the Court

[Updated: 6/14/02]

If it becomes necessary during your deliberations to communicate with me, you may send a note through the jury officer signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me on anything concerning the case except by a signed writing, and I will communicate with any member of the jury on anything concerning the case only in writing, or orally here in open court. If you send out a question, I will consult with the parties as promptly as possible before answering it, which may take some time. You may continue with your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged.

Comment

(1) Although Rogers v. United States, 422 U.S. 35, 39 (1975), could be read as requiring any response to a deliberating jury's questions to occur orally in open court in the defendant's presence, the First Circuit seems to permit a written response, so long as the lawyers are shown the jury's note and have the opportunity to comment on the judge's proposed response. See, e.g., United States v. Maraj, 947 F.2d 520, 525-26 (1st Cir. 1991).

(2) "[I]t is always best for the trial judge not to know the extent and nature of a division among the jurors and to instruct the jury not to reveal that information. Nevertheless, 'if the jury does volunteer its division, the court may rely and act upon it.'" United States v. Rengifo, 789 F.2d 975, 985 (1st Cir. 1986) (quoting United States v. Hotz, 620 F.2d 5, 7 (1st Cir. 1980)) (citations omitted).

6.06 Charge to a Hung Jury

[Updated: 10/25/02]

I am going to instruct you to go back and resume your deliberations. I will explain why and give you further instructions.

In trials absolute certainty can be neither expected nor attained. You should consider that you are selected in the same manner and from the same source as any future jury would be selected. There is no reason to suppose that this case would ever be submitted to 12 men and women more intelligent, more impartial or more competent to decide it than you, or that more or clearer evidence would be produced in the future. Thus, it is your duty to decide the case, if you can conscientiously do so without violence to your individual judgment.

The verdict to which a juror agrees must, of course, be his or her own verdict, the result of his or her own convictions, and not a mere acquiescence in the conclusion of his or her fellow jurors. Yet, in order to bring 12 minds to a unanimous result, you must examine the questions submitted to you with an open mind and with proper regard for, and deference to, the opinion of the other jurors.

In conferring together you ought to pay proper respect to each other's opinions and you ought to listen with a mind open to being convinced by each other's arguments. Thus, where there is disagreement, jurors favoring acquittal should consider whether a doubt in their own mind is a reasonable one when it makes no impression upon the minds of the other equally honest and intelligent jurors who have heard the same evidence with the same degree of attention and with the same desire to arrive at the truth under the sanction of the same oath.

On the other hand, jurors favoring conviction ought seriously to ask themselves whether they should not distrust the weight or sufficiency of evidence which fails to dispel reasonable doubt in the minds of the other jurors.

Not only should jurors in the minority re-examine their positions, but jurors in the majority should do so also, to see whether they have given careful consideration and sufficient weight to the evidence that has favorably impressed the persons in disagreement with them.

Burden of proof is a legal tool for helping you decide. The law imposes upon the prosecution a high burden of proof. The prosecution has the burden to establish, with respect to each count, each essential element of the offense, and to establish that essential element beyond a reasonable doubt. And if with respect to any element of any count you are left in reasonable doubt, the defendant is entitled to the benefit of such doubt and must be acquitted.

It is your duty to decide the case, if you can conscientiously do so without violence to your individual judgment. It is also your duty to return a verdict on any counts as to which all of you agree, even if you cannot agree on all counts. But if you cannot agree, it is your right to fail to agree.

I now instruct you to go back and resume your deliberations.

Comment

(1) This charge contains all the elements of the modified Allen charge, Allen v. United States, 164 U.S. 492, 501-02 (1896), approved in United States v. Nichols, 820 F.2d 508, 511-12 (1st Cir. 1987). In the interest of clarity, these elements have been rearranged and clearer language substituted. The elements satisfy the requirements contained in United States v. Hernandez-Albino, 177 F.3d 33, 38 (1st Cir. 1999) and United States v. Paniajua-Ramos, 135 F.3d 193, 197 (1st Cir. 1998): the instruction must be carefully phrased (1) to place the onus of reexamination on the majority as well as the minority, (2) to remind the jury of the burden of proof, and (3) to inform the jury of their right to fail to agree. According to United States v. Angiulo, 485 F.2d 37, 40 (1st Cir. 1973), "whenever a jury first informs the court that it is deadlocked, any supplemental instruction which urges the jury to return to its deliberations must include the three balancing elements stated above." In Paniajua-Ramos, the court found plain error in an Allen charge that started with the pattern charge but emphasized the need to agree and did not clearly refer to the jury's right to fail to agree. 135 F.3d at 198-99.

(2) The First Circuit has found such a charge proper upon a *sua sponte* jury report of deadlock after nine hours of deliberation over two days, Nichols, 820 F.2d at 511-12, but improper after three hours of deliberation with no jury report of difficulties in agreeing, United States v. Flannery, 451 F.2d 880, 883 (1st Cir. 1971).

(3) A direct charge like this must be used once the jury indicates deadlock, rather than an indirect response to a question that may imply an obligation to deliberate indefinitely. United States v. Manning, 79 F.3d 212, 222-23 (1st Cir. 1996) (finding it improper to respond to jury question whether it was obliged to reach a verdict by asking "Would reading any portion of the testimony to you assist you in reaching a decision?"). Moreover, *any* supplemental charge that urges the jury to return to its deliberations must contain all three elements referred to in Comment (1). Hernandez-Albino, 177 F.3d at 38.

(4) In United States v. Barone, 114 F.3d 1284, 1304 (1st Cir. 1997), the First Circuit cautioned against using the Allen charge a second time because "[a] successive charge tends to create a greater degree of pressure." Although the First Circuit declined to create a per se rule against issuing a second charge, Id., it has recently indicated that a second charge may be warranted in only the most unique and extreme circumstances. In United States v. Joel Keene, 287 F.3d 229 (1st Cir. 2002), the court stated that "the giving of successive Allen charges is an extraordinary measure—and one that should be shunned absent special circumstances." 287 F.3d at 235. In that case, the jurors had deliberated for about as long as evidence had been presented, the dispute to be resolved by the jury was sharply focused, the first Allen charge had been unsuccessful, and the jury was increasingly adamant, in its notes to the trial court, that it was irretrievably deadlocked. The court indicated that, in other settings, the party desiring a second Allen charge must be able to identify "special circumstances" that would "favor[] the utterance of yet another modified Allen charge" but did not offer an indication of what those circumstances might be. Id.